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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1289

GARLAND CLAUDE COCHRAN and
JACK DONALD EVANS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Tenth Circuit in this case is reported in ..... F.2d ..... A copy of the official opinion of this case is appended hereto.

(b)

GROUNDS OF JURISDICTION

The opinion sought to be reviewed, entitled Garland Claude Cochran v. United States of America, No. 9624, and Jack Donald Evans v. United States of America, No. 9625, a joint appeal, is undated, but the same was filed on January 30, 1968. A petition for rehearing was denied on March 6, 1968. Thereafter the Court below entered an order staying its mandate for a period of 30 days from March 6, 1968, to and including April 5, 1968, pending the filing and ultimate disposition of this petition for writ of certiorari.

The jurisdiction of this Court is invoked under 28 USC 1254(1), and under and by virtue of Title 18, USC 3772, within the time provided for in Rule XI and Rule 22(2) of the Rules of Practice and Procedure of the Supreme Court of the United States.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Tenth Circuit has decided important questions of federal law of gravity and importance in the administration of criminal justice which have not been but should be settled by this Court. The decision of that Court in this case, in applying a decision of this Court, is contrary to decisions of the First Circuit and the Fifth Circuit Courts of Appeal, so that the law as applied in the Tenth Circuit now differs from that applied in the First Circuit and the Fifth Circuit. Additionally, the Court below has ruled on serious questions of search and seizure contrary to the rulings of this Court under similar circumstances. In its rulings, the Court has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

(c)

QUESTIONS PRESENTED

1.

Did the Court below err in holding that the Petitioners are without standing to contest the validity of the search of a codefendant and in ruling that they were without standing to contest the search; and in so ruling did that Court misconstrue and misapply the decision of this Court in *McDonald* v. *United States,* 335 US 451, contrary to the construction and application of such decision of this Court by other circuit courts of appeal?

2.

Did the Court below err in holding that there was probable cause for the search and seizure of a codefendant, such holding being contrary to the teaching of *United States* v. *DiRe,* 332 US 581?

3.

Did the trial court err in considering all of the evidence in the case in ruling upon the issue of probable cause to justify an arrest and search as opposed to considering only such facts as were known to the arresting officers at the time of the arrest?

4.

Should this case be remanded to the Court below for further consideration in the light of the recent decisions of this Court in *Marchetti* v. *United States,* ..... US .....; *Grosso* v. *United States,* ..... US .....; and *Haynes* v. *United States,* ..... US .....?

(d)

STATUTES INVOLVED

26 USC 5205(a)(2). CONTAINERS of DISTILLED SPIRITS.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter.

26 USC 5604(a)(1). GENERAL.—Any person who shall transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of Section 5205(a)(2), unless the immediate container thereof has affixed thereto a stamp as required by such section . . . shall be fined not more than $10,000., or imprisoned not more than five years, or both, for each such offense.

(e)

STATEMENT OF THE CASE

Petitioners were jointly indicted and tried with a co-defendant, Rider. The jury found Rider not guilty. The Petitioners were convicted and appealed from the sentences imposed. The charges were the sale of nontaxpaid distilled spirits in violation of 26 USC 5604(a)(1).

Federal officers learned of a proposed shipment of moonshine whiskey by truck by Georgia to Denver, Colorado. The information was obtained from a Denver man who had been approached to handle the whiskey. In due course, the truck and a Pontiac automobile arrived in the vicinity where the transaction was to occur. The arrangements for the delivery and sale were made by Petitioner Cochran. Over a period of about two hours, Cochran completed the arrangements, delivered the whiskey,

received payment and was arrested almost immediately. While Cochran was so engaged, Evans and Rider parked the Pontiac at a filling station near the delivery point and remained in the area. One of the federal agents was from Georgia and knew Cochran, Evans and Rider. He knew that they had previously been involved in liquor law violations. However, this officer was not present when Evans and Rider were arrested and this information was not imparted to his fellow officers until after the arrest and subsequent search.

The trial court found that there was probable cause for the arrest of Rider. Accordingly, it admitted in evidence against all of the defendants a document seized from Rider at the time of his arrest. This document contained the address and telephone number of the Denver man to whom the whiskey was delivered.

When the aforesaid document was offered in evidence during the course of the trial, objection was made by the defendants to the admission of the document on the ground that it had been seized in violation of Rule 41, Federal Rules of Criminal Procedure and the Fourth Amendment to the Constitution of the United States. After hearing evidence on this objection, pursuant to Rule 41, out of the presence of the jury, the Court ruled the evidence admissible, stating: "The Court feels that considering all of the evidence that was received while the jury was in attendance, together with the additional evidence received today, that the arrest was a lawful arrest, the search was a lawful search, and Exhibit 18 will be received in evidence."

At the time of this ruling, substantially the entire case offered by the government, including the facts known to the officers at the time of the arrest and those facts subsequently learned by them, was before the Court. In other

words, the Court considered all of the evidence and not just that which was known to the officers at the time of the arrest in reaching this conclusion.

REASONS FOR GRANTING THE WRIT

In ruling that the Petitioners had no standing to complain of the illegal search of co-defendant Rider, the Court followed its earlier ruling in *Sumrall* v. *United States,* 10 Cir., 382 F.2d 651, 655. That ruling and the ruling in the present case is diametrically opposed to and indistinguishable from the ruling of the Courts of Appeal in *Rosencranz* v. *United States,* 1 Cir., 334 F.2d 738; and *Barnett* v. *United States,* 5 Cir., 384 F.2d 848, 862. Thus, the Tenth Circuit has decided a case on substantially the same facts, and reached a decision contrary to that reached by the First Circuit and the Fifth Circuit and a decision which is contrary to the decision of this Court in *McDonald* v. *United States,* 335 US 451.

In reaching the conclusion that the search of Rider was not illegal, the Court of Appeals refused to follow this Court's decision in *United States* v. *DiRe,* 332 US 581. The facts of the two cases are substantially indistinguishable and the Court of Appeals made no effort to distinguish them. In addition to this, the Court of Appeals sustained the trial court in taking into consideration the accumulated facts of the case, in ruling on the motion to suppress evidence, as opposed to considering only those facts known to exist at the time of the arrest. This ruling is contrary to the ruling of this Court in *Rios* v. *United States,* 364 US 263.

Finally, subsequent to the trial of the instant case and subsequent to the submission of briefs in the same, this Court decided the cases of *Marchetti* v. *United States,* ..... US .....; *Grosso* v. *United States,* ..... US ....., and

Haynes v. *United States,* ..... US ..... The decisions of this Court in those cases have a direct bearing upon the facts and issues in the present case. This Court should remand the case to the Tenth Circuit Court of Appeals for the purpose of considering the same in the light of those decisions.

Question One Restated

Did the Court below err in holding that the Petitioners are without standing to contest the validity of the search of a codefendant and in ruling that they were without standing to contest the search; and in so ruling did that Court misconstrue and misapply the decision of this Court in *McDonald* v. *United States,* 335 US 451, contrary to the construction and application of such decision of this Court by other circuit courts of appeal?

In *McDonald* v. *United States,* 335 US 451, officers illegally entered a room and arrested a tenant and another person. Upon the strength of evidence obtained as a result of the search made incident to the arrests, the two persons were subsequently convicted. In reversing the convictions based upon the unlawful search and seizure, as to the codefendant, this Court said: "Even though we assume, without deciding, that Washington, who was a guest of McDonald, had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well. In this case, unlike *Agnello* v. *United States,* Supra (269 US p. 35), the unlawfully seized materials were the basis of evidence used against the codefendant. If the property had been returned to McDonald, it would not have been available for use at the trial. We can only

speculate as to whether other evidence which might have been used against Washington would have been entirely probative."

The First Circuit, in *Rosencranz* v. *United States,* 1 Cir., 334 F.2d 738, under a factual situation which is indistinguishable from the present case, held that codefendants had a standing, under the *McDonald* decision, to move to suppress evidence illegally seized from a codefendant. The Fifth Circuit reached a similar result in *Barnett* v. *United States,* 5 Cir., 384 F.2d 848, 862. In its opinion in the present case, however, the Tenth Circuit, although citing only the *Barnett* case, stated, "If the language of that opinion is construed as giving standing to the appellants to complain of the search of Rider, we most respectfully disagree."

We think that the language of this Court in the *McDonald* case clearly rules that Petitioners in the present case have standing to complain of the illegal search of a codefendant, where evidence seized from said defendant was used against them upon the trial of the case. The First Circuit and the Fifth Circuit agree with this contention; however, the Tenth Circuit, both in this case and in the case of *Sumrall* v. *United States,* 10 Cir., 382 F.2d 651, disagrees.

We respectfully submit that this Court should grant the petition for writ of certiorari to determine this important constitutional question. In order that the administration of criminal justice might be uniform throughout the United States, the question should be authoritatively decided so as to give guidance both to Courts and to citizens affected by the rulings.

Question Two Restated

Did the Court below err in holding that there was probable cause for the search and seizure of a codefendant, such holding being contrary to the teaching of *United States* v. *DiRe*, 332 US 581?

A review of the record, as contained in the statement of facts and in the opinion of the Court below, discloses that Cochran had made arrangements for the sale of the whiskey to the informer in Denver. The whiskey was delivered and the informer paid Cochran for it. At that time, Cochran was arrested. In the meantime, a Pontiac automobile bearing a Georgia license tag had arrived and was parked at a service station nearby. After the arrest of Cochran, some of the officers participating in the investigation, arrested and searched Rider, Evans and the vehicle. At that time, according to the evidence contained in the record, the only information available to the officers concerning the activities of Rider and Evans was that they were in command of a Pontiac automobile with a Georgia license tag on it. Further, they had been seen in the vicinity of the arrest for a period of about an hour or two. In *United States* v. *DiRe*, 332 US 581, the facts as stated by the Court disclose that certain federal officers had knowledge of the fact that an illegal transaction concerning counterfeit coupons was to take place at a certain time and place. This information was based upon the statement of an informer who was participating in the transaction.

The officers observed the informer, the party with whom the transaction was to take place, and DiRe, in a parked automobile. After observing the transaction, they approached the vehicle and arrested the three occupants, searching them. The primary defendant was seated in the

front seat under the steering wheel, the informer was in the rear seat, and DiRe was seated in the front passenger seat. As a result of the search of DiRe, counterfeit coupons were found on his person. DiRe was convicted of possessing the coupons, his motion to suppress evidence having been overruled. This Court held that there was not sufficient probable cause for the arrest of DiRe without a warrant and reversed the conviction. This Court held that the mere presence of DiRe in the automobile under the circumstances related did not constitute probable cause for his arrest and subsequent search.

Under the facts of the present case, the *DiRe* case is indistinguishable. As a basis for this ruling, the Court, in its opinion, stated, "The officers knew of the proposed delivery. Rider and Evans arrived almost simultaneously with Cochran. Evans and Rider stayed in the immediate vicinity for a prolonged period. They traveled in a car bearing a Georgia license. They were recognized as associates of Cochran in Georgia. The officers reasonably concluded that the three were acting in concert. The search and seizure were incident to the lawful arrest."

The record discloses without question that Rider and Evans were not recognized as associates of Cochran until after their arrest. The only officer who knew them was not on the scene at the time of the arrest and recognized them only after conversing with them following the arrest. Even if this were not so, under the decision of this Court in *DiRe,* there would not have been probable cause for the arrest of Rider and Evans. As this Court said in the *DiRe* case: "We see no grounds for expanding the rule in the *Carroll* case to justify this arrest and search as incident to the search of the car. We are not convinced that a person, by mere presence in the suspected car, loses immunities from search of his person to which he would otherwise be entitled."

Question Three Restated

Did the trial court err in considering all of the evidence in the case in ruling upon the issue of probable cause to justify an arrest and search as opposed to considering only such facts as were known to the arresting officers at the time of the arrest?

It is now axiomatic and uniformly held that a search made incident to an arrest made without warrant is not justified if the arrest itself was unlawful. *Johnson* v. *United States,* 333 US 10. Nothing that happens after an arrest is made can make the arrest lawful, or justify a search as its incident. *Rios* v. *United States,* 364 US 263. As we understand the law and urge here, it is not necessary that the facts known to the officer be sufficient to convict, *United States* v. *Ventresca,* 380 US 102, but it is essential that the arrest be based upon facts known to the officer, whether or not hearsay, at the time of the arrest. In other words, the mere fact that another person has knowledge which, if communicated to the arresting officer, would constitute probable cause, does not justify an arrest in the absence of such communication. In short, an arrest and search without a warrant can be justified only upon probable cause, known to exist at the time of the arrest. Justification cannot be retroactive or vicarious or sustained by an accumulation of uncommunicated facts.

At the time the trial court ruled upon the motion to suppress evidence, which was made during the course of the trial, the United States had introduced a substantial amount of evidence showing facts which the record necessarily disclosed were learned by them subsequent to the arrests. These facts relate to the rental of a truck in Mississippi for the purpose of transporting the whiskey, travel of the truck from Mississippi to Colorado, entry of

the truck into Colorado, the identity of Rider and Evans, and, to some extent, their connection with the transaction. In ruling upon the motion to suppress, however, instead of limiting its consideration to the evidence available and known to the officers at the time of the arrest of Rider, the Court considered, by its own statement, all of the evidence in the case. We submit that this was substantial error which affected the substantial rights of the parties. It may be that the Court would have overruled the motion to suppress evidence based only upon the facts known to the officers at the time of the arrests. We cannot know what the Court would have held had it limited its consideration to those facts. Petitioners were entitled to a ruling in conformity with the existing law. The judgment below deprived them of such a ruling.

We respectfully submit that this Court should either reverse the judgment below for this error and remand the case for a new trial, or, at the least, remand the case to the trial court with direction that the court properly determine this issue.

Question Four Restated

Should this case be remanded to the Court below for further consideration in the light of the recent decisions of this Court in *Marchetti* v. *United States,* ..... US .....; *Grosso* v. *United States,* ..... US .....; and *Haynes* v. *United States,* ..... US .....?

In its recent decisions in *Marchetti* v. *United States,* ..... US .....; *Grosso* v. *United States,* ..... US ....., and *Haynes* v. *United States,* ..... US ....., this Court held, in short, that the Fifth Amendment privilege against self-incrimination was violated by federal convictions for failure to pay wagering excise tax; failure to register

possession of a firearm; and failure to register and pay occupational tax for engaging in the business of accepting wages. In his dissenting opinion in the *Grosso* case, applicable to all three cases, Mr. Chief Justice Warren observed that the decisions of this Court were "opening the door to a new wave of attacks on a number of federal registration statutes whenever the registration requirement touches upon allegedly illegal activities." We submit that the possession and sale, or transfer, of tax unpaid spirits is closely related to, if not indistinguishable from, the possession of the unregistered firearm in the *Haynes* case. In order to acquire and place the stamps required by the Internal Revenue Laws on containers of whiskey, it is essential that there be involved in the production of spirits a registered distillery and that the bond required by statute be first posted. 26 USC 5171, 5173, 5179. In such cases, the tax is paid on the basis of a return which must be filed, 26 USC 5061, and the stamps are issued under the regulations of the Secretary. 26 USC 5205(3). Yet, the registration of a distillery, the giving of bond, the filing of a distilled spirits tax return, the acquisition of stamps or the payment of the tax, imposes upon the person so affected, in this case, the Petitioners, a duty to incriminate themselves under both state and federal law, whether such acts are performed by them directly or indirectly. 18 USC 2, 4.

Accordingly, the vice found by the Supreme Court in the three cases cited is present here. The rationale applied there is applicable here. While the constitutionality of the prosecution under the statutes here involved was not raised prior to or during the trial, we respectfully submit that the case should be remanded for the purpose of determining that constitutional issue. Under the state of the law existing prior to the decision of the three cases

mentioned above, we urge that this Court apply the rule applied in *Grosso* wherein this Court stated, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege. Under the facts and circumstances present here, as to this issue, we submit that this Court should remand the case to the Court below for decision on this important and significant question.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for writ of certiorari should be granted and that this Court should determine that the Court below erred in the respects herein urged.

Respectfully submitted,

.....

ROBERT B. THOMPSON

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM, 1968

GARLAND CLAUDE COCHRAN,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.
No. 9624

JACK DONALD EVANS,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.
No. 9625

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Before PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

PER CURIAM.

Byron G. Rogers, Jr., and Robert B. Thompson submitted on brief for Appellants.

Lawrence M. Henry, United States Attorney, and Richard T. Spriggs, Assistant United States Attorney for the District of Colorado, submitted on brief for Appellees.

Appellants Cochran and Evans were jointly indicted and tried with a co-defendant Rider. The jury found Rider not guilty. Cochran and Evans were convicted and appeal from the sentences imposed. The charges were the sale of non-tax paid distilled spirits in violation of 26 U.S.C. § 5604(a)(1). The only error claimed is the receipt in evidence of a paper taken from Rider at the time of his arrest.

Federal officers learned of a proposed shipment of moonshine whiskey by truck from Georgia to Denver. The information was obtained from a Denver man who had been approached to handle the whiskey. In due course the truck and a Pontiac car arrived in the vicinity where the transaction was to occur. The arrangements for the delivery and sale were made by Cochran. Evans rented the truck in which the haul was made. The two were accompained by Rider. Over a period of about two hours Cochran completed the arrangements, delivered the whiskey, received payment, and was arrested almost immediately. While Cochran was so engaged, Evans and Rider parked the Pontiac at a filling station near the delivery point and remained in the area. One of the federal agents was from Georgia and knew Cochran, Evans, and Rider and knew that they had been previously involved in liquor violations. This information was imparted to his fellow officers.

The trial court found that there was probable cause for the arrest of Rider. We agree. The officers knew of the proposed delivery. Rider arrived and Evans arrived almost simultaneously with Cochran. Evans and Rider stayed in the immediate vicinity for a prolonged period. They traveled in a car bearing a Georgia license. They were recognized as associates of Cochran in Georgia. The officers reasonably concluded that the three were acting

in concert. The search and seizure were incident to the lawful arrest.

Additionally, Cochran and Evans have no standing to question the search of Rider. In Sumrall v. United States, 10 Cir., 382 F.2d 651, 655, we held that the one aggrieved by a search "is the one who has himself been the victim of an unlawful invasion of his own privacy." The only privacy invaded here was that of Rider and he was acquitted. Counsel for appellants call our attention to the decision in Barnett v. United States, 5 Cir., 384 F.2d 848, 862. The facts there considered are entirely different from what we have here. If the language of that opinion is construed to give standing to the appellants to complain of the search of Rider, we most respectfully disagree.

Affirmed.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing petition of Garland Claude Cochran and Jack Donald Evans were deposited in the United States Post Office with air-mail postage prepaid, addressed to the Solicitor General of the United States, Department of Justice, Washington 25, D. C.; Lawrence M. Henry, Esquire, United States Attorney, and Richard T. Spriggs, Assistant United States Attorney, for the District of Colorado, Federal Building, Denver, Colorado.

This the 2nd day of April, 1968.

.....

ROBERT B. THOMPSON